

¹ 5 U.S.C. § 8101 *et seq.*

decision regarding her December 1, 2015 request for an appeal of the September 21, 2015 decision. Appellant notes that it did not issue a decision until December 5, 2016.

FACTUAL HISTORY

On January 16, 2015 appellant, then a 51-year-old mail clerk, filed a traumatic injury claim (Form CA-1) alleging that on December 29, 2014 she sustained a lower back injury when she sat in a chair at work that jolted down to the floor. She stopped work on the date of injury.

In support of her claim, appellant submitted a January 12, 2015 progress note from Dr. Sireen Gopal, an attending Board-certified physiatrist. Dr. Gopal noted a history of the claimed December 29, 2014 incident, reported findings on physical examination, and assessed lumbar radiculopathy, lumbosacral arthritis, unspecified obesity, sacroiliitis not elsewhere classified, and unspecified myalgia and myositis. He placed appellant off work until her next office visit.

By letter dated January 27, 2015, OWCP notified appellant of the deficiencies in her claim and afforded her 30 days to submit additional evidence and respond to its claim development questionnaire.

On February 17, 2015 appellant responded to OWCP's development questionnaire. She claimed that on December 29, 2014 she sat down in her chair at work which jolted her downward and caused sharp back pain. Appellant examined the chair and discovered that it was not her usual chair. She continued to have back pain as she walked to locate her chair. Appellant informed the employing establishment about her injury and refused ambulance transport to a hospital. The employing establishment determined that the chair was broken and removed it. Appellant addressed her medical treatment, severe pain in her lower back and buttocks radiating down her right leg, and difficulty with standing, sitting, walking, bending, and lifting.

Appellant submitted a January 12, 2015 disability certificate wherein Dr. Gopal advised that appellant was totally disabled through February 16, 2015. In a February 16, 2015 progress note, Dr. Gopal restated his assessments of lumbar radiculopathy, lumbosacral arthritis, unspecified obesity, sacroiliitis not elsewhere classified, and unspecified myalgia and myositis.

In a January 13, 2015 lumbar spine x-ray report, Dr. Daniel S. Gurell, a Board-certified radiologist, provided an impression of no fracture or dislocation.

By decision dated March 5, 2015, OWCP denied appellant's traumatic injury claim as the medical evidence of record did not contain a well-rationalized medical opinion explaining how the diagnosed conditions were causally related to the accepted December 29, 2014 employment-related incident. It reissued the decision on March 6, 2015.

OWCP received a March 30, 2015 progress note from Dr. Gopal who reiterated the assessments in his January 12 and February 16, 2015 progress notes. In a prescription of the same date, Dr. Gopal ordered physical therapy to treat appellant's lumbosacral arthritis.

By appeal request form dated March 30, 2015, received by OWCP on April 3, 2015, appellant requested a review of the written record by an OWCP hearing representative.

OWCP received New York State Workers' Compensation doctor's narrative reports dated February 16 and July 8, 2015 from Dr. Gopal. Dr. Gopal indicated the date of injury as December 29, 2014. He restated his diagnoses of obesity and sacroiliitis not elsewhere classified. Dr. Gopal diagnosed thoracic/lumbosacral neuritis/radiculitis, unspecified and lumbosacral spondylosis without myelopathy. He responded "yes" that the incident described by appellant was the competent medical cause of her injury/illness. Dr. Gopal also responded "yes" that her complaints were consistent with her injury/illness and that her history of injury/illness was consistent with his objective findings. He, in the February 16, 2015 report, advised that appellant had no temporary impairment. In the July 8, 2015 report, Dr. Gopal determined that she had 100 percent temporary impairment. In his June 8 and July 8, 2015 progress notes, he reiterated the assessments set forth in his prior progress notes. In the July 8, 2015 progress note, Dr. Gopal noted that appellant could return to limited-duty work on July 13, 2015. In a June 9, 2015 prescription, he again ordered physical therapy to treat appellant's chronic lumbosacral arthritis.

In a September 16, 2015 progress note, a physician assistant noted a history of the December 29, 2014 incident, reported examination findings, and assessed lumbar radiculopathy, lumbosacral arthritis, unspecified obesity, sacroiliitis not elsewhere classified, and unspecified myalgia and myositis. He noted that appellant had a preexisting lower back condition since 1999. The physician assistant advised that her current condition was exacerbated by her recent work accident and was caused by a work-related injury. He apportioned 50 percent to appellant's 1999 injury and 50 percent to her present injury.

By decision dated September 21, 2015, an OWCP hearing representative affirmed the March 5, 2015 decision. She found that the medical evidence of record was insufficient to establish that appellant had a firm medical diagnosis causally related to the December 29, 2014 work incident.

In a letter dated December 1, 2015, received by OWCP on February 1, 2016, appellant requested a review of the written record by a hearing representative.

OWCP received additional reports from Dr. Gopal, including New York State doctor's narrative reports dated August 5, September 16, and October 15, 2015 wherein he reiterated the prior diagnoses and responses set forth in his February 16 and July 8, 2015 form reports. In an October 30, 2015 functional capacity report, Dr. Gopal reiterated his diagnoses of lumbar radiculopathy and unspecified site of other myositis. He diagnosed other intervertebral disc degeneration of the lumbar region. Dr. Gopal addressed, among other things, the extent of permanent impairment to appellant's lumbar spine, bilateral lower extremities, and whole person based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).²

OWCP received an additional progress note dated October 15, 2015 from the physician assistant wherein he restated his assessment of lumbar radiculopathy, unspecified obesity, and unspecified site of other myositis. He assessed other intervertebral disc degeneration and spondylosis without myelopathy or radiculopathy of the lumbar region.

² 5th ed. 2001.

OWCP received additional New York State doctor's narrative reports dated December 1, 2015 and February 10, 2016 from Dr. Gopal and a February 10, 2016 progress note from the physician assistant all of which reiterated prior diagnoses and assessments.

In a December 5, 2016 decision, a representative of OWCP's Branch of Hearings and Review denied appellant's request for a review of the written record. As she had previously received a review of the written record, appellant was not entitled to a second hearing or a review of the written record as a matter of right. The hearing representative also exercised her discretion and found that the matter could be equally well addressed through the reconsideration process.

By appeal request form dated December 21, 2016, received by OWCP on December 29, 2016, appellant requested reconsideration. She did not indicate the date of the decision she wanted OWCP to reconsider. In support of her reconsideration request, appellant submitted an October 30, 2015 functional evaluation report reviewed by Dr. Gopal. Dr. Gopal restated his diagnoses of lumbar radiculopathy, unspecified site of other myositis, and other intervertebral disc degeneration, lumbar region. He noted appellant's functional impairment deficits and her reliable effort during testing. Dr. Gopal read and interpreted the report, made the appropriate treatment protocol changes, and reviewed this with appellant. In a December 20, 2016 progress note, a physician assistant noted his assessment of appellant's condition.

By decision dated March 16, 2017, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. It noted that it was unclear what decision she was requesting OWCP to reconsider as she had crossed out the date of the decision. OWCP advised, however, that if appellant was requesting reconsideration of the September 21, 2015 merit decision, her request was untimely filed as it was received more than one year after the issuance of that decision.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁴ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁵

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, OWCP must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error. If an application

³ 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁶ To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁷ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.⁸ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question as to the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.⁹

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. OWCP's regulations¹⁰ and procedures¹¹ establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision. The most recent merit decision was an OWCP hearing representative's September 21, 2015 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since OWCP did not receive her request until December 29, 2016, it was filed outside of the one-year time period. As appellant's December 29, 2016 request for reconsideration was submitted more than one year after the September 21, 2015 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of her claim.¹²

The Board has reviewed the record and finds that the evidence submitted in the untimely request for reconsideration does not raise a substantial question as to the correctness of OWCP's last merit decision and is therefore insufficient to demonstrate clear evidence of error. The underlying issue in appellant's claim was medical in nature with respect to causal relationship. The Board notes that the term clear evidence of error is intended to represent a difficult

⁶ *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (February 2016) (the term clear evidence of error is intended to represent a difficult standard).

⁷ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ *See E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ *J.S.*, Docket No. 10-0385 (issued September 15, 2010); *B.W.*, Docket No. 10-0323 (issued September 2, 2010).

¹⁰ *Supra* note 4; *see Alberta Dukes*, 56 ECAB 247 (2005).

¹¹ Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1602.4 (February 2016); *see Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹² *Supra* note 4 at § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

standard.¹³ Even a detailed, well-rationalized medical report, which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, is insufficient to demonstrate clear evidence of error.¹⁴ It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.¹⁵

Appellant submitted Dr. Gopal's October 30, 2015 functional evaluation report wherein he diagnosed radiculopathy and other intervertebral disc degeneration of the lumbar region and unspecified site of other myositis. This evidence repeats his prior diagnoses and does not address the relevant issue of whether appellant sustained an injury in the performance of duty on December 29, 2014. Evidence which duplicates or repeats evidence already in the case record or is irrelevant does not raise a substantial question as to the correctness of OWCP's decision.¹⁶ Appellant has not sufficiently explained how the resubmission of this evidence demonstrates clear evidence of error.¹⁷

Appellant also submitted a December 20, 2016 progress note from a physician assistant. A physician assistant is not considered a physician as defined under FECA and, thus, his progress note does not constitute competent medical evidence.¹⁸ Consequently, this evidence is insufficient to demonstrate clear error by OWCP with respect to the underlying medical issue.

The Board thus finds that OWCP properly found that appellant's December 29, 2016 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. OWCP therefore properly denied appellant's reconsideration request.

On appeal appellant contends that her attending physician diagnosed lumbar conditions and explained that the accepted employment incident caused these current conditions and exacerbated her prior back condition. For the reasons set forth above, the Board finds that the evidence submitted in support of appellant's untimely request for reconsideration was insufficient to shift the weight of the evidence in appellant's favor and raise a substantial question as to the correctness of OWCP's September 21, 2015 decision denying her traumatic injury claim.

Appellant further contends on appeal that OWCP failed to issue a timely decision regarding her December 1, 2015 request for an appeal of the September 21, 2015 decision. She notes that it did not issue a decision until December 5, 2016. The Board, as noted above, only

¹³ Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1602.5 (October 2011); *see Dean D. Beets, supra* note 7.

¹⁴ *See L.L.*, Docket No. 13-1624 (issued December 5, 2013); *D.G.*, 59 ECAB 455 (2008).

¹⁵ *See M.N.*, Docket No. 15-0758 (issued July 6, 2015).

¹⁶ *See D.B.*, Docket No. 16-0539 (issued May 26, 2016); *see also supra* note 7.

¹⁷ *See A.M.*, Docket No. 10-0526 (issued November 8, 2010) (appellant did not sufficiently explain how largely duplicative evidence raised a substantial question as to the correctness of OWCP's decision).

¹⁸ 5 U.S.C. § 8101(2); *Sean O'Connell*, 56 ECAB 195 (2004).

has jurisdiction over OWCP's March 16, 2017 nonmerit decision which denied her request for reconsideration and, therefore, is precluded from conducting a merit review.

CONCLUSION

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 16, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 2, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board